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Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-805

CIVIL SERVICE COMMISSION OF THE STATE OF NEW YORK, a governmental agency, ERSA POSTON, in her official capacity as Chairman of the Civil Service Commission of the State of New York,

Appellants,

against

MARIE SNEAD,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT FOR APPELLANTS

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JURISDICTIONAL STATEMENT FOR APPELLANTS

Appellants appeal from a decision of the United States District Court for the Southern District of New York (statutory three-judge court), entered on July 22, 1975, declaring unconstitutional Section 72 of the New York Civil Service Law.

Opinions Below

The opinion of the single district judge granting the motion to convene a three-judge court, dated November 30, 1972, is reported at 351 F. Supp. 1360. The first opinion and final order of the three-judge court, dated March 12, 1973, is reported at 355 F. Supp. 764. The second opinion and final order of the three-judge court, dated November 18, 1974, is reported at 389 F.Supp. 935. The third decision of the three-judge court, dated July 22, 1975, is not reported and is reproduced herein as Appendix "A".

Jurisdiction

The decision of the three-judge court was entered on July 22, 1975. The notice of appeal was filed on August 8, 1975 and is reproduced herein as Appendix "B".

The jurisdiction of this Court to review the instant case is conferred by 28 U.S.C. § 1253.

Statutes Involved

The relevant statute, Section 72 of the New York Civil Service Law is reproduced herein as Appendix "C".

Questions Presented

1. Whether the case has become moot by virtue of appellee's satisfactory performance following reinstatement to her job.

2. Whether due process requires that civil service employees be afforded an adversary hearing before being placed on a temporary leave of absence.

Statement of the Case

Appellee is a case worker with the New York City Department of Social Services and a tenured civil service employee. On May 10, 1972 she was placed on leave of absence for a period of up to one year based upon a psychiatric finding that she was mentally incapable of performing the duties of her position. This action was purportedly taken pursuant to Section 72 of the New York Civil Service Law. In fact, although Section 72 requires that the examination be conducted by a neutral medical officer, appellee was examined by a medical officer of her employer. On August 28, 1972, she appealed this determination to the New York City Civil Service Commission but did not pursue her appeal.

On October 25, 1972 appellee commenced the instant action claiming that her rights to due process and equal protection were violated because she was not given an adversary hearing prior to being placed on leave of absence. She denied that she was mentally disabled and alleged that her First Amendment rights were violated because her leave of absence was racially motivated and also reflected the fact that she had criticized the operation of Department of Social Service programs. She also claimed that the New York City Department of Social Services failed to comply with the terms of the statute. In addition to temporary injunctive relief, appellee moved for the convening of a three-judge court to declare Section 72 unconstitutional on its face. She also moved for an order declaring that the procedures used by the defendants in applying the statute to her "contravened the statute as written".

By decision dated November 30, 1972 the single district judge concluded that the question of whether due process required notice of charges and a hearing prior to the leave of absence authorized by Section 72 was a substantial one

requiring the convening of a three-judge court. In so holding, the court determined that the "nature of [appellee's] employment" was an " 'important interest' " comparable to interests which this Court has protected in recent decisions. 351 F. Supp. at 1365. However, the "nature of [appellee's] employment" was not defined by the court which, instead, apparently relied upon appellee's loss of income and general allegations that the Section 72 leave of absence foreclosed other employment and carried a stigma.* The question of what procedure would satisfy due process was referred to the three-judge court. 351 F. Supp. at 1366.

On March 13, 1973 the three-judge court declared Section 72 unconstitutional and enjoined appellants from taking any action thereunder. The court rejected appellants' contention that exhaustion of state administrative remedies was required where, as here, the administrative appeal goes to the question of whether the employee's claim before such court was ripe. Relying upon *King* v. *Smith,* 392 U.S. 309, the court determined that such exhaustion is unnecessary where the constitutional question raised by a civil rights plaintiff is so substantial as to require the convening of a three-judge court. 355 F. Supp. at 768.

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* The district judge took a different view of appellee's allegations of injury in denying her motion for a temporary restraining order. The court pointed out that appellee would suffer no permanent economic loss if she ultimately prevailed.

> "As to what she terms a 'badge of inferiority and incompetency,' the finding of the examining doctor is not a matter of public record, and that her leave of absence carries with it a stigma in this day is arguable". 351 F. Supp. at 1366.

The court weighed these allegations against the City defendants' "claim of disruptive conduct [by appellee] over an extended period, and the expressed concern for the safety of staff members" and concluded that to issue a temporary restraining order

> "would create a difficult and tense situation. It would result in potential interference with the normal functioning of a public office". 351 F. Supp. at 1367.

The court then rejected appellants' argument that abstention was appropriate. The court acknowledged that New York courts have read hearing provisions into statutes for the purpose of upholding their constitutionality, particularly in cases involving the mentally ill. However, it concluded that the legislative history of Section 72 barred this interpretation as well as an interpretation which would permit the employee to controvert the psychiatrist's report without holding a full hearing. The court also determined that nothing in the legislative history would allow the state courts to limit the Section 72 procedure to "emergency" situations.

On the merits the court held that appellee had been deprived of both liberty and property under the Due Process Clause. Her property right was based on the fact that as a permanent civil service employee "she has a right to continued employment in the absence of just cause". 355 F. Supp. at 771. Her right to liberty was violated because "a finding of mental illness severely diminishes a person's 'freedom to take advantage of other employment opportunities' ". *Id.*

The court held that the procedures afforded by Section 72 do not satisfy due process requirements because there is no provision for an adversary hearing before the employee is placed on leave. In its view, a prior hearing must be held so long as "there is no overwhelming necessity requiring immediate action". *Id.*

The neutral medical examination mandated by the statute as a prerequisite to placing the employee on leave of abence was held to be constitutionally inadequate because it does not "assure that a finding of mental unfitness will be a fair and accurate one". 355 F. Supp. 772. The court assumed that the conclusions of the doctor and the appointing authority as to mental fitness are "predicated in part upon their judgments concerning the truth or falsity of the charges which prompted the examination". *Id.*

Section 72 was, therefore, declared to be unconstitutional. "In light of this . . . disposition of the attack against Section 72 on its face" the Court did not consider appellee's First Amendment claim. 355 F. Supp. 767, n. 5. Nor did it consider the claim that appellee's employer had failed to comply with the terms of the statute despite the fact that counsel for the City defendants never denied that this was indeed the case.

Based upon its finding that the statute was unconstitutional the Court enjoined appellants from utilizing its provisions. The Court also ordered that appellee be reinstated with back pay for the relevant period.

On March 29, 1973, the Court granted appellants' motion for a stay of its order pending disposition of an appeal to this Court. The stay excepted from its operation the stipulation between appellee and the City defendants agreeing to reinstate appellee pursuant to the Court's order.

On May 13, 1974, this Court vacated the judgment of the three-judge court and remanded the case for further consideration in light of *Arnett* v. *Kennedy,* 416 U.S. 134. On November 18, 1974, the three-judge court again held Section 72 unconstitutional on its face. After contrasting the procedures available in *Arnett* with the Section 72 procedure, the Court adhered to its original determination that " 'defendants must conduct an adversarial hearing before placing civil service employees in permanent status on involuntary leave of absence for mental unfitness in the absence of exceptional circumstances requiring immediate action' ". 389 F. Supp. at 936-937.

The court acknowledged that by virtue of its ruling appellee was being accorded greater protection than the employee in *Arnett,* but distinguished the two cases by differentiating between the impact on reputation and employability involved in each case. According to the Court, a

finding of mental illness results in greater "potential lasting harm" than does a charge that the employee recklessly made public accusations that his employer was guilty of offering bribes to public officials. 389 F. Supp. at 937. In addition, although there is no support in the record or the statute, the Court assumed that a finding of mental illness—"even a preliminary finding"—would remain in the employee's file and be available to potential employers even if the employee is vindicated upon appeal. In view of these differences the Court concluded that "due process requires the observance here of more adequate safeguards against an incorrect initial determination". 389 F. Supp. at 937.

Following the Court's decision, appellants moved to amend the judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure and Rule 9(m) of the Rules of the District Court of the Southern District of New York on the ground that the action was moot and academic. In support of the motion appellants urged that the action had become moot because appellee, who had been reinstated to her position by court order, was now described as an excellent employee. Appellants submitted an affidavit to this effect prepared by appellee's employer. The affidavit also stated that there was no longer any need to apply the provisions of Section 72 to appellee. Since the City defendants had never denied that they did not comply with the statute, appellants maintained that the issue of back pay could be determined without reference to the constitutionality of the statute.

In any event, appellants contended that the Court should not have determined the constitutionality of the statute on its face since appellee's employer had not complied with the terms of the statute and, therefore, the statutory procedure which is the subject of the cause of action was never actually initiated. Appellants' motion was denied without opinion on January 7, 1975.

On February 13, 1975, appellants' motion for a stay of the Court's order pending appeal to this Court was denied. At the same time the Court denied without opinion a motion by appellee to have the action certified as a class action.

Appellant's application to this Court for a stay pending appeal was denied on April 7, 1975 by Justice Blackmun. On May 27, 1975 this Court vacated the judgment of the three-judge court and remanded the case "for consideration of the question of mootness".

On July 22, 1975, the three-judge court held that the case was not moot although appellee has been reinstated to her former position. The Court relied upon the fact that the City defendants have continued to withhold appellee's back pay "pursuant to a statute that this court has held unconstitutional". The Court therefore concluded that appellee was entitled to entry of a judgment "declaring the statute unconstitutional and providing for back pay".

On August 8, 1975, when it became evident that no judgment would be entered within thirty days of the Court's decision, the State appellants filed a notice of appeal in order to be sure of protecting their right to appeal, particularly since no separate judgment had been entered by the three-judge court at the time of its two earlier decisions in this matter. Plaintiff thereafter submitted a proposed judgment for settlement. At that time, the City defendants, for the first time, disputed the power of the Court to award appellee any back pay. In order to allow for resolution of this point before appealing to this Court, the State defendants applied for an extension of time in which to docket their appeal. On October 6, 1975, Mr. Justice Marshall extended the State's time to and including December 6, 1975.

On November 5, 1975, the three-judge court was reconvened and heard argument with respect to the City's

liability. To date, there has been no decision and, consequently, no judgment. The instant brief is being filed by the State defendants in order to comply with the order of Mr. Justice Marshall.

ARGUMENT

This appeal presents substantial questions of law requiring reversal by this Court of the decision below.

1. The three-judge court erroneously reached out to decide the constitutionality of Section 72 of the New York Civil Service Law when the case had become moot.

Appellee was reinstated to her position as a social worker with the New York City Department of Social Services pursuant to the original decision of the three-judge court, dated March 13, 1973. She has continued to perform in that position to date. According to an affidavit submitted by her employer to the court below, her performance has been excellent and there is no longer any reason to apply the procedures of Section 72 of the New York Civil Service Law to her. There is, therefore, no longer any live grievance between her and appellants and the decision below should be reversed on the ground that the action is moot as against them. *Golden* v. *Zwickler*, 394 U.S. 103 (1969); *DeFunis* v. *Odegaard*, 416 U.S. 312 (1974).*

The three-judge court held that the case was not moot only because an issue remains as to appellee's entitlement to back-pay. In the Court's view back pay is being withheld by the City defendants "pursuant" to a statute which it held unconstitutional in its previous opinions. The Court's reasoning is a good example of the tail wagging the dog.

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* *DeFunis* is particularly relevant since there, as here, the case ultimately became moot because of a court order giving the plaintiff personal equitable relief at an early stage of the litigation.

Contrary to the decision below, the question of appellee's entitlement to back pay does not arise from any constitutional defects in the procedure but, in the first instance, from the failure to implement those procedures. Section 72 requires that the examination of an employee for possible mental disability be conducted by a neutral medical officer "selected by the civil service commission or municipal commission having jurisdiction". The examination must not be conducted "under the aegis of the appointing authority . . ." *New York Legislative Annual—1969,* p. 64. Despite this statutory requirement, appellee was examined by a medical officer of her employer before being placed on leave of absence, and her complaint so alleges.* Moreover, the City defendants have never denied their failure to comply with the terms of the statute.

Because appellee's employer clearly failed to comply with the statute she attacks, its constitutionality was never actually put in issue. Her entitlement to relief is based solely on the procedure used in her particular case, not the statutory provisions which were not followed. Since the back-pay issue could have been resolved without deciding the constitutionality of the statute, the complaint should have been dismissed as against appellants. *Hagans* v. *Lavine,* 415 U.S. 528 (1974). Contrast *Powell* v. *McCormack,* 395 U.S. 486 (1969).

2. The question of whether due process requires that Civil Service employees be afforded an adversary hearing before being placed on a temporary leave of absence is a significant one for government employers which was erroneously resolved by the three-judge court.

In *Arnett* v. *Kennedy* this Court upheld the constitutionality of the federal procedure for discharging a tenured civil service employee although the procedure does not provide for a pretermination hearing. Before *Arnett,* the three-judge court in this case had gone one step further and held that a tenured employee must be afforded a full adversary hearing before he may be placed on an involuntary leave of absence for mental disability. On the remand in light of *Arnett,* the three-judge court, apparently feeling itself bound by the result in *Arnett* insofar as that case determined the property rights of tenured employees, nevertheless adhered to its original decision, but this time relying solely on appellee's alleged liberty interest. The result reached is still unprecedented. Indeed, the court below specifically acknowledged that its ruling affords more substantial protection of an individual's liberty interest than this Court has required in any of its decisions, including *Arnett.*

Assuming that the instant case presents a justiciable controversy, the court below erred because its decision is based upon an unwarranted expansion of the liberty interest of a public employee. The Court compounded its error by determining the form of the hearing and the time at which it must be held without reference to the crucial interest asserted by the State.

A. *The decision of the three-judge court is based upon an unwarranted extension of the decisions of this Court.*

In *Arnett* v. *Kennedy,* Mr. Justice Rehnquist, writing for the plurality, stated that an employee's interest in liberty under the Fourteenth Amendment "is not offended by dismissal from employment itself" although the dismissal is based upon a finding of cause. 416 U.S. at 157. On the contrary, the employee's liberty interest is offended only when his dismissal is "based upon an unsupported charge which could wrongfully injure [his] reputation" (*Id.*)—a charge such as "dishonesty, or immorality". *Board of Regents* v. *Roth,* 408 U.S. 564, 573 (1972).

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* Consistently with this allegation, the complaint prayed, *inter alia,* for an order declaring that the procedures used by the City defendants in applying the statute to appellee "contravened the statute as written".

In the instant case the three-judge court paid lip-service to *Roth* and *Arnett* and then ignored them by holding that a finding of mental illness results in a violation of the employee's liberty interest although the finding is not an "unsupported charge" but, by statute, must be made by a neutral medical examiner.

Thus, in its first opinion the three-judge court assumed that "a finding of mental illness severely diminishes a person's 'freedom to take advantage of other employment opportunities.'" The Court enlarged upon this assumption in its second opinion, stating,

> "the fact is that employment opportunities are reduced where an employer's files contain a finding—even a preliminary finding—of mental illness, which can be made available to any inquiring prospective employer" 389 F. Supp. at 937.*

Aside from the fact that there is no support in the record for either of these assumptions, they represent a departure from the *Roth* standard as reaffirmed in *Arnett*. The standard enunciated in *Roth* is not whether ability to earn a living has been diminished or "severely diminished" but whether it has been "foreclosed".

Moreover, in order to meet the *Roth* standard of serious harm to "standing and associations in the community" or "stigma . . . that forecloses . . . other employment opportunities" (408 U.S. at 573), it is evident that the employer must publish the allegedly damaging charge. The cases cited in *Roth* as illustrative of the circumstances

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* This assumption is to be contrasted with that of the single judge who, in convening the three-judge court, noted that "the finding of the examining doctor is not a matter of public record." The single judge also queried whether in today's society mental illness carries a stigma. *Snead* v. *Dept. of Social Services of the City of New York*, 351 F. Supp. 1360, 1366.

in which a stigma can properly be claimed support this view.

Wisconsin v. *Constantineau*, 400 U.S. 433, 435-436 (1971), applied due process protections to the public characterization of an individual as an inebriate. *Weiman* v. *Updegraff*, 344 U.S. 183, 190-191 (1952) invalidated a state loyalty oath under the Due Process Clause which classified individuals on the basis of associations with allegedly subversive or Communist front organizations. *Joint Anti-Fascist League* v. *McGrath*, 341 U.S. 23 (1951), invalidated as *ultra vires* the distribution of lists of certain allegedly communist organizations to all federal departments and agencies to be used to screen employees for disloyalty. *United States* v. *Lovett*, 328 U.S. 303, 316-317 (1946) invalidated a federal statute as a bill of attainder which effectively barred three individuals named in the statute from government service and which was enacted following a speech on floor of the House of Representatives wherein the named individuals were alleged to be members of "Communist front" organizations. *Peters* v. *Hobby*, 349 U.S. 331 (1955) reversed as *ultra vires* publicized administrative actions which barred a medical consultant from government services for three years. See *Birnbaum* v. *Trussell*, 371 F. 2d 672, 677-678 (2d Cir. 1966), holding that a physician dismissed on charges of racial bias and blacklisted at all municipal hospitals on the instructions of his former employer was entitled to due process protections because of serious damage to his reputation and ability to pursue his career.

The Section 72 procedure, which contemplates the employee's return to work and not his permanent discharge, by the same token, does not contemplate the type of publication inherent in the court's examples. Significantly, there has never been any allegation in the instant case that the finding of mental illness was in fact publicized by the

employer or likely to be publicized. Indeed, although appellee alleged in her complaint that during her leave of absence she was "unable to obtain any source of income" except from friends and relatives, she did not allege that she unsuccessfully sought other employment, let alone that she was prevented from obtaining other employment because of the finding of mental illness.

It is evident that the three-judge court acted purely on the basis of surmise in equating a medically determined finding of mental illness with charges such as disloyalty, dishonesty and immorality which heretofore have been recognized by this Court as constitutionally relevant. Certainly the possibility that in individual cases there may be a special effect on professional reputation is no reason to invalidate a statute of general application (*Lindsey* v. *Normet*, 405 U.S. 56 [1972], particularly where, as here, the statute does not provide for an outright discharge but merely a temporary leave of absence followed by the employee's return to his position.

Section 72 represents an enlightened attempt to deal with mental illness in the civil service by recognizing that although it occurs, it may be treated and overcome. Rather than terminate the services of a mentally ill employee on the grounds of incompetence and thereby cause a permanent blemish on his record, Section 72 is designed to encourage the employee to seek treatment and return to his job. The Legislature thus has determined that there is no stigma attached to mental illness. It is that determination which has been set aside by the decision below. In essence, it is the court below which has placed a stigma on mental illness. This Court should remove it.

B. *The three-judge court failed to recognize that it was bound by this Court's decision in Arnett* v. *Kennedy, 416 U.S. 134.*

According to the plurality opinion in *Arnett* v. *Kennedy*, and that of the two justices who specifically concurred therein in relevant part, when a charge has been made which affects an employee's liberty interest,

> "a hearing afforded by administrative appeal procedures *after* the actual dismissal is a sufficient compliance with the requirements of the Due Process Clause." 416 U.S. at 157 (Emphasis supplied.)

Despite this unequivocal ruling by a majority of this Court, the court below proceeded to carve out an exception where the alleged stigma is a finding of mental illness. Moreover, it did so by failing to take account of the fact that the Government interest which excused a prior hearing in *Arnett* is also at stake in the instant case.

The approach adopted by the three-judge court was that of comparing the impact on reputation and employability in a case like appellee's—albeit there was no evidence in the record of any impact—with the impact which might be caused by the charge involved in *Arnett*. In the Court's view, the initial Section 72 finding is likely "to produce more substantial harm" which would be "less easily eliminated by a subsequent vindication" than would be true in *Arnett*. 389 F. Supp. at 937.

Assuming *arguendo* that the speculation indulged in by the three-judge court is realistic, there are nevertheless two defects in its approach. The first is that absolutely nothing in *Arnett* suggests that stigmas be, in effect, rated for due process purposes. On the contrary, the majority's conclusion that a post-termination hearing is adequate is in no way limited to the alleged stigma in that case but has reference to all cases in which a liberty interest is involved.

In fact, the Court treated the charge against the employee in *Arnett* as being, in effect, an accusation of dishonesty, i.e., a type of charge previously recognized by this Court as constitutionally relevant. 416 U.S. at 156-157.

The second defect in the approach used by the three-judge Court is that it determines what procedures are due the employee solely from the viewpoint of the employee's interests. This is directly contrary to the decisions of this Court which state that

> "consideration of what procedures due process may require under any given set of circumstances *must begin with a determination of the precise nature of the government function involved* as well as of the private interest that has been affected by governmental action." (Emphasis supplied)

Cafeteria & Restaurant Workers v. *McElroy*, 367 U.S. 886, 895 (1961); *Goldberg* v. *Kelly*, 397 U.S. 254, 263 (1970). It was only by making *no* reference at all to the crucial interest asserted by the State that the court below decided not only that a Section 72 leave of absence must be preceded by a hearing but also that the hearing must be adversarial in nature.

Section 72 was enacted to resolve what the Legislature found to be "[o]ne of the most knotty personnel problems that plagues both State and Municipal agency heads"—the problem of the employee who is capable of reporting to work, but is mentally incapable of performing his duties while there.

> "The illness or disability in almost all cases of this kind is a mental or emotional disturbance or instability, sometimes accompanied by physical deterioration. Such an employee very often is a disruptive influence on the rest of the staff. His work has to be absorbed by others—frequently under very trying circumstances. In most cases he does not realize his incapacity and is suspicious and accusatorial, causing a constant state of tension." *New York Legislative Annual—1969*, p. 63.

The State's interest in the instant case is thus at least as substantial as that which excused a prior hearing in *Arnett*. Here, as in *Arnett*,

> ". . . the Government's interest, and hence the public's interest, is the maintenance of employee efficiency and discipline. Such factors are essential if the Government is to perform its responsibilities effectively and economically. To this end, the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency. Moreover, a requirement of a prior evidentiary hearing would impose additional administrative costs, create delay, and deter warranted discharges. Thus, the Government's interest in being able to act expeditiously to remove an unsatisfactory employee is substantial. 416 U.S. at 168.

On the other hand, the employee's interest in the instant case is no more substantial than that of the employee in *Arnett*. Indeed, it may be less substantial given the fact that Section 72 merely contemplates a leave of absence and not an outright discharge. In any event, because the three-judge court failed to weigh the relevant interests as required by *Arnett*, it erroneously distinguished this case from *Arnett* in holding that a prior hearing is necessary.

Contrast *Sanford* v. *Rockefeller*, 35 NY2d 547, 324 N.E.2d 113 (1974), appeal dismissed *sub nom. Sanford* v. *Carey*, 421 U.S. 973 (1975).*

C. *In the case of a temporary leave for mental disability due process is satisfied by a neutral medical examination followed by a comprehensive appeal.*

Due Process "does not require a trial-type hearing in every conceivable case of government impairment of private interest." *Cafeteria & Restaurant Workers* v. *McElroy*, 367 U.S. 886, 894 (1961). As this Court recently emphasized:

> "'[t]he formality and procedural requisites for the hearing can vary, depending upon the interests involved and the nature of the subsequent proceedings.'" *Board of Regents* v. *Roth*, 408 U.S. 564, 570, n. 8.

In the instant case the State's interest is that of insuring that agencies which are required to perform a public function be staffed at all levels of responsibility with personnel competent to perform their assigned duties. The employee's interest is in avoiding an unwarranted leave of absence even though he is subject to reinstatement and reimbursement if the employer has erred. The procedure established by Section 72 satisfies due process standards because it is relevant to the State's problem and also protects the employee from arbitrary action by his employer "within the limits of practicability." *Boddie* v. *Connecticut*, 401 U.S. 371, 379 (1971); *Mullane* v. *Central Hanover Trust Co.*, 339 U.S. 306, 318 (1950). More is not required.

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* The dismissal in *Sanford* reaffirms appellants' view that due process does not require a prior hearing in the instant case, particularly since *Sanford*, like the instant case, was decided following this Court's remand for reconsideration in light of *Arnett* v. *Kennedy*.

Section 72 does not establish a summary procedure but requires that before the State may act with respect to an allegedly mentally disabled employee there must be a medical examination by a neutral medical officer.* The issue to be determined by the physician is not whether there were, in fact, grounds to request a psychiatric examination in the first place, but the limited medical issue of whether the employee is mentally able to perform his job. This is a medical evaluation of the employee's state of mind based upon a first-hand examination.

Pursuant to subdivision 3 of Section 72, the employee may appeal to the relevant Civil Service Commission from the determination placing him on leave and/or following a refusal to reinstate at which time the Civil Service Commission may "conduct such inquiry as it deems necessary or desirable" in reviewing the employee's case. This review is sufficiently broad and flexible to permit the employee to introduce any relevant evidence to rebut the finding of mental disability. This would not exclude any medical report or evidence produced by the employee upon his own initiative.

The review further requires that the Commission have the benefit of the opinion of another neutral medical officer. At a minimum, therefore, the Commission is likely to have before it *three* expert opinions upon which to make a determination that the initial finding was or was not arbitrary.

In addition, Article 78 of the New York Civil Practice Law and Rules affords judicial assurance that no employee will be treated erroneously under the provisions of Section 72. *Sanford* v. *Rockefeller*, 35 N Y 2d 547, 324

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* This procedure is to be contrasted with that approved in *Arnett* v. *Kennedy* which permitted the person who preferred the charges against the employee to be the decision-maker. Furthermore, in *Arnett*, "the hearing official was the object of slander that was the basis for the employee's proposed discharge." 416 U.S. at 199.

N.E. 2d 113 (1974), appeal dismissed *sub nom. Sanford* v. *Carey*, 421 U.S. 973 (1975). In such a proceeding the employee may submit anew any controverting papers bearing upon the disposition he challenges. He may include an allegation that the determination was based upon a mistake of underlying fact, including the grounds for referral to the psychiatrist, and litigate that question *de novo* in the state courts. *Matter of Thomasson* v. *Valentine*, 263 App. Div. 334, 336-37, 32 N.Y.S. 2d 996 (1st Dept. 1942). *Cf. Matter of Marks* v. *Schechter*, 12 A D 2d 74, 208 N.Y.S. 2d 570 (1st Dept. 1960), affd. 10 N Y 2d 759, 117 N.E. 2d 51 (1961).

The procedures available both before and after the employee is placed on leave are plainly sufficient to establish "the validity, or at least the probable validity, of the underlying claim" of mental disability (*Sniadach* v. *Family Finance Corp.*, 395 U.S. 337, 343 [1969]; *Fuentes* v. *Shevin*, 407 U.S. 67, 97 [1972]) and thereby protect the employee's interest in remaining on the job. At the same time they serve the government's critical interest in the proper and efficient functioning of its agencies. The imposition of additional procedural formalities would, as Mr. Justice Powell emphasized in *Arnett*, "impose additional administrative costs, create delay and deter warranted" leaves of absence (416 U.S. at 168)—a consequence which the court below neglected to consider and which this Court has sought to avoid. *Cafeteria & Restaurant Workers* v. *McElroy*, 367 U.S. 886 (1961); *Goldberg* v. *Kelly*, 397 U.S. 254, 264 (1970).

CONCLUSION

This Court should note probable jurisdiction and summarily reverse the decision below or, in the alternative, should grant plenary consideration to the instant appeal.

Dated: New York, New York, December 4, 1975.

Respectfully submitted,

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APPENDIX "A"

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

72 Civil 4536

OPINION

MARIE SNEAD,

Plaintiff,

against

DEPARTMENT OF SOCIAL SERVICES OF THE CITY OF NEW YORK, a governmental agency, JULES SUGARMAN, in his official capacity as Commissioner of the Department of Social Services of the City of New York, INES MONTEVERDE, in her official capacity as a Supervisor in the Department of Social Services of the City of New York, CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK, a governmental agency, HARRY I. BRONSTEIN, in his official capacity as Chairman of the Civil Service Commission of the City of New York, CIVIL SERVICE COMMISSION OF THE STATE OF NEW YORK, a governmental agency, ERSA POSTON, in her official capacity as Chairman of the Civil Service Commission of the State of New York,

Defendants.

Before MULLIGAN, Circuit Judge, and WEINFELD and BRYAN, District Judges.

Appendix "A".

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Appendix "A".

PER CURIAM:

After the Supreme Court vacated the judgment entered pursuant to our initial opinion holding that section 72 of the New York Civil Service Law is unconstitutional,[1] and remanded the case for further consideration in light of *Arnett* v. *Kennedy*,[2] we reaffirmed our initial holding on November 18, 1974.[3] The Supreme Court has again vacated the judgment and remanded the case, this time for consideration of the question of mootness.[4]

The State's motion to amend the reaffirmed judgment specifically raised the question of mootness in the same posture in which it is now presented. After due consideration, the motion was denied.

After this Court's initial decision ordering plaintiff's reinstatement with back pay, the parties entered into a stipulation that provided, pending final disposition of the appeal by the Supreme Court, for plaintiff's reinstatement and a stay of the back pay award. Plaintiff has been reinstated to her former position and is receiving her current salary, but the City stubbornly refuses to give her back pay. Thus, back pay, which this Court has indicated from the outset is an essential element of full relief,[5] continues to be withheld pursuant to a statute that this court has held unconstitutional. Under the circumstances, the case is clearly not moot.[6]

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[1] 355 F. Supp. 764 (S.D.N.Y. 1973).

[2] 416 U.S. 134 (1974). The Supreme Court's initial remand is reported at 416 U.S. 977 (1974).

[3] 389 F. Supp. 935 (S.D.N.Y. 1974).

[4] 43 U.S.L.W. 3624 (U.S., May 27, 1975).

[5] 351 F. Supp. 1360, 1366 (S.D.N.Y. 1972); 365 F. Supp. 764, 773. *Cf.* Albemarle Paper Co. v. Moody, 43 U.S.L.W. 4880, 4883-86 (U.S., June 25, 1975).

[6] *See* Powell v. McCormack, 395 U.S. 486, 495-500 (1969).

Appendix "A".

Plaintiff is entitled to the entry of judgment declaring the statute unconstitutional and providing for back pay for the period of her involuntary leave of absence together with interest thereon. Judgment may be entered accordingly.

Dated: New York, N. Y., July 22, 1975.

WILLIAM H. MULLIGAN (per R.E.M.)
U.S.C.J.

EDWARD WEINFELD
U.S.D.J.

FREDERICK VAN PELT BRYAN
U.S.D.J.

APPENDIX "B"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NOTICE OF APPEAL
72 Civ. 4536

MARIE SNEAD,

Plaintiff,

against

DEPARTMENT OF SOCIAL SERVICES OF THE CITY OF NEW YORK, a Governmental Agency, JULE SUGARMAN, in his official capacity as Commissioner of the Department of Social Services of the City of New York, INES MONTEVERDE, in her official capacity as Supervisor in the Department of Social Services of the City of New York, CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK, a Governmental Agency, HARRY I. BRONSTEIN, in his official capacity as Chairman of the Civil Service Commission of the City of New York, CIVIL SERVICE COMMISSION OF THE STATE OF NEW YORK, a Governmental Agency, ERSA POSTON, in her official capacity as Chairman of the same,

Defendants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the New York State Civil Service Commission and Chairman Ersa Poston, defendants in this action, hereby appeal to the Supreme Court of the United States from the decision granting a declaratory judgment and a permanent injunction entered in this action on July 22, 1975.

Appendix "B".

This appeal is taken pursuant to 28 U.S.C. § 1253.

Dated: New York, New York, August 8, 1975.

Yours. etc.,

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APPENDIX "C"

§ 72. LEAVE FOR ORDINARY DISABILITY

1. When in the judgment of an appointing authority an employee is unable to perform the duties of his position by reason of a disability, other than a disability resulting from occupational injury or disease as defined in the workmen's compensation law, the appointing authority may require such employee to undergo a medical examination to be conducted by a medical officer selected by the civil service department or municipal commission having jurisdiction. If, upon such medical examination, such medical officer shall certify that such employee is not mentally fit to perform the duties of his position, the appointing authority may place such employee on leave of absence. An employee placed on leave of absence pursuant to this section shall be given a written statement of the reasons therefore. An employee on such leave of absence shall be entitled to draw all accumulated, unused sick leave, vacation, overtime and other time allowances standing to his credit.

2. An employee placed on leave pursuant to subdivision one of this section may, within one year after the date of commencement of such leave of absence, or thereafter at any time until his employment status is terminated, make application to the civil service department or municipal commission having jurisdiction over the position from which such employee is on leave, for a medical examination by a medical officer selected for that purpose by such department or commission. If, upon such medical examination, such medical officer shall certify that such employee is mentally fit to perform the duties of his position, he shall be reinstated to his position.

Appendix "C".

3. An employee who is certified as not mentally fit to perform the duties of his position and who is placed on leave of absence pursuant to subdivision one of this section, or who is denied reinstatement after examination pursuant to subdivision two of this section, may appeal from such determination to the state or municipal civil service commission having jurisdiction over his position. Such commission may conduct such inquiry as it deems necessary or desirable, and shall provide for a medical examination of such employee, which shall be conducted by a medical officer designated by the commission who shall not be the same medical officer who examined the appellant under subdivision one or two in connection with the determination under appeal. If the commission finds that the determination appealed from is arbitrary or unreasonable, it shall direct the reinstatement of such employee.

4. If an employee placed on leave pursuant to this section is not reinstated within one year after the date of commencement of such leave, his employment status may be terminated in accordance with the provisions of section seventy-three of this article.

Added L.1969, c. 225, § 2, eff. April 25, 1969.

Supreme Court, U. S.
FILED
MAR 1 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-805

CIVIL SERVICE COMMISSION OF THE STATE OF NEW YORK, a governmental agency, ERSA POSTON, in her official capacity as Chairman of the Civil Service Commission of the State of New York,

Appellants,

—against—

MARIE SNEAD,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM AND BRIEF IN SUPPORT THEREOF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-805

CIVIL SERVICE COMMISSION OF THE STATE OF NEW YORK, a governmental agency, ERSA POSTON, in her official capacity as Chairman of the Civil Service Commission of the State of New York,

Appellants,

—against—

MARIE SNEAD,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Motion to Affirm

Pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, Appellee moves that the final judgment and decree of the District Court be summarily affirmed without further argument on the ground that the questions urged have been so plainly foreclosed by the

decisions of this Court so as to make further argument unnecessary.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-805

CIVIL SERVICE COMMISSION OF THE STATE OF NEW YORK, a governmental agency, ERSA POSTON, in her official capacity as Chairman of the Civil Service Commission of the State of New York,

Appellants,

—against—

MARIE SNEAD,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF IN SUPPORT OF MOTION TO AFFIRM

Introductory Statement

There are two questions before this Court at this time. Initially, this Court must determine whether the due process issue herein is moot and, if so, whether or not the doctrine of mootness should be invoked herein with the effect of foreclosing consideration of the substantive issue raised by this case.

When the District Court considered the issue of mootness, upon remand by this Court (with direction), it noted at that time that "the case was clearly not moot." See: July 22, 1975 Decision of the District Court (unpublished)

as set forth in Appendix "A" to Appellants' Jurisdictional Statement. While the circumtances herein have changed since that pronouncement, nevertheless the due process issue raised in this case is still viable and the doctrine of mootness should not be invoked.

After disposing of the initial question respecting mootness and depending on its resolution this Court may then have to determine whether tenured civil service employees are entitled to due process protection prior to being placed on involuntary leave of absence for up to (1) year because of alleged mental incompetence. In its initial decision, the District Court below held:

> ". . . that the Constitution requires that before involuntary leaves of absence are effectuated, which may continue for one year without pay, tenured civil service employees charged with a mental disability be granted a hearing containing the 'rudimentary due process' necessary to the accurate determination of the validity of the allegation."

See: 355 F.Supp. 764, 773 (S.D.N.Y. 1973), *vacated* 416 U.S. 977, 94 S.Ct. 2376, 40 L.Ed.2d 755 (1974).

After reconsidering this very same issue, upon remand by this Court (with direction) in light of its decision in *Arnett* v. *Kennedy*, 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974), the District Court held:

> "Careful consideration of *Arnett* does not require any change in this court's conclusion that the procedures challenged in this case do not comport with due process."

See: 389 F.Supp. 935 (S.D.N.Y. 1974), *vacated* 421 U.S. 982, 95 S.Ct. 1985, 44 L.Ed.2d 474 (1975).

These District Court holdings are supported by and consistent with *Arnett* v. *Kennedy, supra* and the pre-*Arnett* decisions of this Court; and, accordingly, they should be affirmed without further argument.

Statement of the Case

Appellee is a social worker who has been employed since 1965 in a permanent civil service position with the Department of Social Services of the City of New York. Section 72 (1) of the New York Civil Service Law provides that, when in the judgment of an appointing authority—an employee is not mentally fit to perform his or her duties, it may require the employee to submit to a medical examination by a medical officer selected by the state or municipal civil service authority having jurisdiction. If the examining medical officer certifies that the employee is not mentally fit to perform his or her duties, the appointing authority may place the employee on leave of absence, without pay, which may continue up to one year. If said employee is not reinstated within one year, the employee is automatically terminated. Section 72(2) and 72(3) provide, respectively, for a second examination at the request of the employee after the imposition of the initial involuntary leave of absence and thereafter for an appeal to the state or municipal civil service commission having jurisdiction. See: Appendix "C" to Appellants' Jurisdictional Statement.

Appellee's appointing officer invoked Section 72 by ordering her to appear for a "mental" examination on May 8, 1972. The examining psychiatrist concluded that the Appellee was unfit to perform the duties of her employment because of alleged mental unfitness and recommended that she be considered for an involuntary medical leave of absence. Her appointing officer accepted this recommenda-

tion and on May 10, 1972, placed her on a one year involuntary leave of absence without pay.[1]

On October 25, 1972, Appellee commenced the instant action claiming that her rights to due process and equal protection of the law were violated because she was not given an adversary hearing prior to being placed on a one year involuntary leave of absence without pay for allegedly being mentally incompetent to perform the duties of her job and because she was not provided an adequate post suspension hearing at which to contest the determination and action.

On November 30, 1972, the single district judge concluded that the question of whether due process required notice of charges and a hearing prior to the effectuation of an involuntary leave of absence, pursuant to Section 72 of the Civil Service Law of the State of New York, was a substantial one requiring the convening of a three-judge court. See: 351 F.Supp. 1360 (S.D.N.Y. 1972).

On March 13, 1973, the three-judge court declared Section 72 facially unconstitutional and enjoined the Appellants from taking any action thereunder. It held that Section 72 of the Civil Service Law of the State of New York violated the Appellee's due process rights as guaranteed under the Fourteenth Amendment to the United States Constitution. See: 355 F.Supp. 764 (S.D.N.Y. 1973).

On March 29, 1973, the Court below granted the Appellants' motion for a stay of its order pending disposition of this appeal. The stay excepted from its operation the stipulation between the Appellee and the City Defendants

[1] The facts surrounding the imposition of the involuntary leave of absence and the relevant provisions of the challenged statute are set forth in the District Court's opinion convening the three-judge panel. See: *Snead* v. *Dept. of Social Services of the City of New York*, 351 F.Supp. 1360, 1362-1364 (S.D.N.Y. 1972).

in which the latter agreed to reinstate the Appellee pursuant to the District Court's order.

On May 30, 1973, the Appellants (Civil Service Commission of the State of New York and Ersa Poston, Chairman thereof) filed a Jurisdictional Statement.

On June 8, 1973 the City Appellants filed their Jurisdictional Statement relying primarily on the statement which the State Appellants had previously submitted.

On June 29, 1973, the Appellee filed a motion to summarily affirm the District Court's decision and a brief in support thereof. On May 13, 1974, this Court vacated the judgment and remanded this case back to the District Court for further consideration in light of this Court's decision in *Arnett* v. *Kennedy, supra.* See: 416 U.S. 977, 94 S.Ct. 2376, 40 L.Ed. 2d 755 (1974).

On November 18, 1974, the District Court reaffirmed its prior decision, distinguishing *Arnett* v. *Kennedy, supra* from the instant case. See: 389 F.Supp. 935 (S.D.N.Y. 1974). On January 7, 1975, the District Court denied Appellants' motion to modify its November 18, 1974 judgment; and on February 13, 1975, the District Court denied the Appellants' motion for a stay of its judgment pending an appeal to this Court. Notice of Appeal was duly filed by the State Defendants below; and a Jurisdictional Statement was filed on March 26, 1975. The City Defendants below did not appeal this matter although they were Appellants on the initial appeal to this Court.

Simultaneous with the filing of their Statement, the Appellants sought a stay from this Court, pending the disposition of this Appeal. On April 10, 1975, Mr. Justice Blackmun denied the Appellants' Application in this regard.

On April 23, 1975, the Appellee filed a motion to summarily affirm the District Court's decision, as initially ren-

dered and subsequently reaffirmed, with a brief in support thereof.

On May 27, 1975, this Court again vacated the judgment and remanded the case back to the District Court (with direction) for consideration of the question of mootness. See: 421 U.S. 982, 95 S. Ct. 1985, 44 L. Ed. 2d 474 (1975). Then Mr. Justice Douglas would have noted probable jurisdiction and set the case down for oral argument. Mr. Justice Brennan, Mr. Justice Marshall, and Mr. Justice Blackmun would have affirmed the judgment of the District Court without further argument.

On July 22, 1975, the District Court issued still another decision in which it held that, as of that date, "the case is clearly not moot." See: Unpublished July 22, 1975 Decision of the District Court as set forth in Appendix "A" to Appellants' Jurisdictional Statement.

On December 4, 1975, the Appellants Civil Service Commission of the State of New York and Ersa Poston, Chairman thereof, filed a Jurisdictional Statement with this Court, Notice of Appeal having been timely given and Mr. Justice Marshall having granted the Appellants leave to docket their appeal out of time. Again the City Defendants below did not appeal this matter.

During the interim period between July 22, 1975 and December 4, 1975, the City Defendants below filed a Motion with the District Court to dismiss the complaint on the ground that the court lacked jurisdiction to grant the Appellee's claim for damages (still at that time outstanding and unpaid).

On December 10, 1975, the District Court issued another decision in which it denied the City Defendants' Motion (Circuit Judge Mulligan, as a member of the three judge district panel, writing a separate opinion in which he concurred in the result but for different reasons). See: De-

cember 10, 1975 Decision of the District Court (unpublished) as set forth in Appendix "A" hereto.

Thereafter Judgment was entered. See: Judgment as set forth in Appendix "B" hereto. The City Defendants have not appealed therefrom and they have agreed to pay said judgment.

ARGUMENT

The Due Process Issue Herein Is Not Moot and the Doctrine of Mootness Should Not Be Invoked.

The Appellants argue, in substance, that, because the Appellee has been put back to work, the due process issue herein is moot since there is no longer any grievance between the Appellee and the Appellants.

However, that position ignores the very fundamental facts that the Appellee, as a Civil Service employee, continues to be subject to the Civil Service Statute herein challenged; and that there is no assurance that the Statute will not be invoked against her, again, should the injunctive relief, herein awarded, be lifted through a vacation of the judgment below. Moreover, to assert that this possibility is speculative is to ignore the circumstances out of which this litigation grew, to wit: that an otherwise excellent employee was suddenly subjected to Section 72 of the Civil Service Act of the State of New York.

Appellants' reliance upon *Defunis* v. *Odegaard*, 416 U.S. 312, 94 S. Ct. 1704, 40 L. Ed. 2d 164 (1974) and *Golden* v. *Zwickler*, 394 U.S. 109, 89 S. Ct. 956, 22 L. Ed. 2d 113 (1969), therefore, is misplaced since in both instances there was *no* possibility that the Plaintiffs therein could continue to be subjected to the challenged conduct.

Thus in *Defunis, supra,* the "controversy" was closed, in toto, since, irrespective of the outcome of the litigation, Mr. Defunis was to graduate from the University of Washington Law School and could never again be subjected to its admission policies therein challenged.

On the other hand, unless the District Court's declaratory judgment is upheld, the injunctive relief attendant thereto will dissolve thereby resurrecting Section 72 and its mechanisms and once again subjecting the Appellee to such notwithstanding that, after three years of litigation and three District Court opinions, said Statute and its mechanisms have continuously and unanimously been held unconstitutional.

There are no representations which the Appellants can make which will guarantee or suggest that there is no reasonable expectation that this very same Appellee will not again be subjected to the very same statute. See: *Defunis* v. *Odegaard, supra,* where the University of Washington represented to this Court that Mr. Defunis would be allowed to graduate irrespective of the outcome of the litigation.

Moreover the reinstatement, itself, of the Appellee to her position, after the declaration of the unconstitutionality of the Statute by the District Court, does not buttress Appellants' argument that the issue herein is moot.

Early on this Court wrote in that respect:

> "Both sides agree to the abstract proposition that voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, *i.e.*, does not make the case moot. United States v. Trans-Missouri Freight Ass'n, 1897, 166 U.S. 290, 17 S.Ct. 540, 41 L.Ed. 1007; Walling v. Helmerich & Payne, Inc., 1944, 323 U.S. 37, 65 S.Ct.

> 11, 89 L.Ed. 29; Hecht Co. v. Bowles, 1944, 321 U.S. 321, 64 S.Ct. 587, 88 L.Ed. 754. A controversy may remain to be settled in such circumstances, United States v. Aluminum Co. of America, 2 Cir., 1945, 148 F.2d 416, 448, *e.g.*, a dispute over the legality of the challenged practices. Walling v. Helmerich & Payne, Inc., supra; Local 74 United Brotherhood of Carpenters, etc., v. National Labor Relations Board, 1951, 341 U.S. 707, 715, 71 S.Ct. 966, 970, 95 L.Ed. 1309. The defendant is free to return to his old ways. This, together with a public interest in having the legality of the practices settled, militates against a mootness conclusion. United States v. Trans-Missouri Freight Ass'n, supra, 166 U.S. at pages 309, 310, 17 S.Ct. 546, 547. For to say that the case has become moot means that the defendant is entitled to a dismissal as a matter of right, National Labor Relations Board v. General Motors Corp., 2 Cir., 1950, 179 F.2d 221. The courts have rightly refused to grant defendants such a powerful weapon against public law enforcement." [Footnotes omitted].

United States v. *W. T. Grant Co.*, 345 U.S. 629, 632, 73 S.Ct. 894, 897, 97 L.Ed. 1303 (1953). Moreover the Court noted that it was particularly inclined to avoid pronouncement of mootness when it is asserted as part of an effort

> ". . . to defeat injunctive relief by protestations of repentance and reform . . . and there is a probability of resumption."

United States v. *W. T. Grant Co., supra* at page 632, footnote five (5). See also: *United States* v. *Oregon State Medical Society*, 343 U.S. 326, 333, 72 S.Ct. 690, 695, 96 L.Ed. 978 (1952).

Since the Appellants herein have never asserted "repentance and reform" insofar as Section 72 of the Civil Ser-

vice law is concerned there can be little doubt that there is not only a probability of resumption of the operation of a facially unconstitutional statute but a certainty of that to the probable detriment of many civil service employees throughout the State of New York including the Appellee herself.

In *Allee* v. *Medrano,* 416 U.S. 802, 810-811, 94 S.Ct. 2191, 40 L.Ed. 2d 566 (1974) this Court recently wrote in this respect:

> "It is settled that an action for an injunction does not become moot merely because the conduct complained of has terminated, if there is a possibility of recurrence, since otherwise the defendants would be free to return to '. . . [their] old ways.' Gray v. Sanders, 372 US 368, 376, 9 L Ed 2d 821, 83 S Ct 801; Walling v. Helmerich & Payne, Inc. 323 US 37, 43, 89 L Ed 29, 65 S Ct 11; United States v. W. T. Grant Co. 346 US 629, 632, 97 L Ed 1303, 73 S Ct 894; NLRB v. Raytheon Co. 398 US 25, 27, 26 L Ed 2d 21, 90 S Ct. 1547; SEC v. Medical Committee for Human Rights, 404 US 403, 406, 30 L Ed 2d 560, 92 S Ct 577."

This is particularly so where, as here, the Appellants have consistently urged the validity of the challenged statute and would therefore be free to require the unencumbered use thereof were not some effective restraint made. See: *Walling* v. *Helmerick & Payne,* 323 U.S. 41, 43, 65 S.Ct. 11, 89 L.Ed. 29 (1944) where this Court wrote in this regard:

> "Voluntary discontinuance of an alleged illegal activity does not operate to remove a case from the ambit of judicial power. Respondent has consistently urged the validity of the [statute] and would presumably be free

> to resume the use of this illegal [statute] were not some effective restraint made. There is thus an actual controversy, and adverse interests, with a subject-matter on which the judgment of the Court can operate."

By invoking the doctrine of mootness herein, the Court is only postponing the inevitable resolution of the due process issue being raised by this litigation since that issue is "capable of repetition yet evading review." See: *Southern Pacific Terminal Co.* v. *ICC,* 219 U.S. 498, 515, 31 S.Ct. 279, 55 L.Ed. 310 (1911). See also: *Defunis* v. *Odegaard, supra* at pages 318-319.

It seems almost cruel, perhaps a perversion of the doctrine of mootness, to invoke the same in order to avoid the review of the due process issue herein where there can be no doubt that the issue will be presented to the Court in the future and where there can be no doubt that the Appellee, herself, will, by the invocation of that doctrine, again be subject to the statute and the possibility of still further cruel and irreparable injury and harm thereunder.

The Decision of the Three-Judge District Court Below Is Supported by and Consistent With This Court's Decision in *Arnett* v. *Kennedy*, 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974) as Well as With This Court's Pre-*Arnett* Decisions Relative to the Necessity for and the Nature of Procedural Due Process.

In order to adequately discuss the propriety of the District Court's decision herein in light of *Arnett* v. *Kennedy, supra,* it is necessary to discuss, initially, the propriety of the District Court's decision in view of this Court's pre-*Arnett* decisions which address themselves to the necessity for and nature of constitutionally guaranteed procedural due process.

A. The Decision of the Three Judge District Court Below Is Supported by and Consistent With This Court's Pre-*Arnett* Pronouncement Relative to the Necessity for and Nature of Procedural Due Process.

In reading *Perry* v. *Sinderman*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed2d 570 (1972) and *Board of Regents* v. *Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972), together, it is clear that this Court has enunciated a two pronged test in determining whether a due process hearing must be accorded to a public employee prior to termination. Those decisions require that, whenever an individual has an expectancy of continued employment ("property interest") or whenever the government has made a charge that would have the effect of impairing an individual's reputation or ability to obtain future employment opportunity ("liberty interest"), rudimentary due process procedures must be invoked to safeguard those constitutionally protected interests.

Combining the holding of *Fuentes* v. *Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972), where this Court observed that a temporary deprivation of a constitutional protected interest may be just as devastating as a permanent deprivation,[2] with the holdings in *Sinderman, supra*, and *Roth, supra*, the Appellee submits that the employee, who is involuntarily placed on a one year's leave of absence without pay for alleged mental incompetence and who thereafter is subject to automatic termination at the end

[2] ". . . it is now well settled that a temporary, non-final deprivation of property is none the less a 'deprivation' in the terms of the Fourteenth Amendment . . . The Fourteenth Amendment draws no bright lines around three-day, 10-day or 50-day deprivations of property." *Fuentes* v. *Shevin, Ibid.*

of that one year period, is entitled to due process before the effectuation of the "leave".[3]

In the instant case, the Appellee has the right to due process procedures in view of the fact that she possessed both of the constitutionally protected interests which this Court recognized in *Sinderman, supra,* and *Roth,*[4] *supra,* and in view of the fact that she was deprived of the same, for a substantial period of time, without being accorded any due process whatsoever.

There is no dispute between the parties that, since the Appellee had civil service status, she had a reasonable expectancy of continued employment in the absence of just cause for termination (a constitutionally protected "property interest").

Moreover, the Court below held that, because the Appellee had been found to be mentally unfit and would, accordingly, be impaired in her ability to attain future employment opportunity, she also had a constitutionally protected "liberty interest" under the rationale enunciated in *Roth, supra.*

Accordingly, in view of the fact that the Appellee possessed both a constitutionally protected "property interest" and a constitutionally protected "liberty interest," she was entitled to rudimentary due process procedures before the effectuation of a governmental action adverse to those interests.

[3] The statute pursuant to which the Appellee was placed on an involuntary leave of absence for one year also provides that, after one year, the employee may be unilaterally terminated. See: Section 72 of the Civil Service Law, Paragraph 4.

[4] In *Roth* this Court re-affirmed a position which it took in *Wisconsin* v. *Constantineau*, 400 U.S. 433, 91 S.Ct. 507, 510, 27 L.Ed. 2d 515 (1971).

Having applied *Perry* v. *Sinderman, supra,* and *Board of Regents* v. *Roth, supra,* and the authorities cited therein, and having found that the Appellee possessed constitutional interests thereunder requiring rudimentary due process procedures and protections before a governmental action adverse to the same can be taken, the Court below then addressed itself to the question of whether Section 72 of the Civil Service Law of New York, in fact, accords an individual satisfactory due process. It concluded that Section 72 did not provide constitutionally satisfactory procedures.

Section 72 authorizes Civil Service employers to place employees who have permanent Civil Service status on an involuntary leave of absence for up to one year, without pay, upon certification by a physician designated by the employer that the employee is mentally unfit to perform his or her duties. Section 72 does not provide for an adversary hearing, representation by counsel, adequate and timely notice of the charges or an opportunity to confront adverse witnesses and/or evidence.[5]

The Court below did not prescribe the precise form the hearing must take, following this Court's direction in this regard; but it did hold that the Appellants must conduct an adversarial proceeding. In so doing, the Court below relied on *Goldberg* v. *Kelly,* 397 U.S. 254, 90 S.Ct. 1101, 25 L.Ed.2d 287 (1970) which defined rudimentary due process procedures as those requiring a timely and adequate notice

[5] The Court below did not reach the Appellee's Equal Protection argument wherein she contended that there was no rational basis for differentiating between the procedures provided in Section 75 of said law, for removing an individual accused of alleged misconduct or suffering from an alleged physical infirmity, and those provided by Section 72, for removing an employee suffering from an alleged mental infirmity. The former provides extensive due process protection whereas the latter does not. See: Appendix "C" hereto.

of the nature of the charges and an effective opportunity to defend the charges or accusations by confronting adverse witnesses, by presenting one's own evidence and by presenting oral arguments before an impartial decision maker with the right to be represented by retained counsel.

The Court below rejected the argument that an ex parte examination by a neutral doctor is the kind of notice and hearing that is likely to establish the validity of the allegation in question. See: *Fuentes* v. *Shevin, supra;* and *Bell* v. *Burson,* 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971). The Court below stated in this regard:

> "Unless doctors are deemed to possess an omniscience which our legal system refuses to attribute to the most experienced judges, they cannot be expected to make fair and accurate factual determinations under such circumstances. Even to the extent that the ultimate determination of mental fitness depends upon the judgment of a doctor based exclusively on his observations of the employee at the examination, fairness requires that the employee have an opportunity to challenge the doctor's conclusions and present his own medical evidence. *Our jurisprudence does not recognize the opinion of any individual expert as infallible; professional judgments concerning mental fitness are just as likely to differ as the observations of laymen regarding simple issues of fact.*" (Emphasis added). 355 F.Supp. 764, 772.

Furthermore, the District Court rejected the argument that the appeal procedures provided for in Section 72 were adequate enough to satisfy rudimentary due process inasmuch as those procedures were couched in discretionary language and placed the burden of proof on the employee to establish that the initial determination of mental incompe-

tence was not arbitrary or unreasonable. Such an appeal procedure was not considered to be an adequate substitute for a fair hearing prior to the action and decision adverse to the constitutionally protected interests.[6]

Recognizing the importance of the state interest in assuring that the state function is carried out effectively and efficiently by competent employees, the Court below appropriately declined to prescribe the exact nature of the due process procedures it mandated other than to require that such procedures be adversarial in nature and consistent with this Court's guidelines, as enunciated in *Goldberg* v. *Kelly, supra,* in order to assure that "the hearing contain 'rudimentary due process' necessary to the accurate determination of the validity of the allegation." [7]

The Court below further stipulated that, except "under exceptional circumstances requiring immediate action", the hearing must be given prior to the placement of the employee on an involuntary leave of absence.[8] *Fuentes* v. *Shevin, supra; Bell* v. *Burson, supra.*[9]

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[6] Since the examination by the medical officer is not required to be transcribed, it would seem difficult to demonstrate that the determination was arbitrary or unreasonable. Again compare Section 75 which provides for a transcription of the hearing.

[7] Relying on *In re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed. 2d 527 (1967) the Court below rejected Appellants' argument that the due process requirement should be less stringent because the legislative motives were benevolent in nature. In that regard, this Court stated:

> ". . . Unbridled discretion, however benevolenty motivated, is frequently a poor substitute for principle and procedure."

In re Gault, Ibid. See: Decision of the Court below at 355 F. Supp. 764, 773 (S.D.N.Y. 1973).

[8] Compare Section 75 of the Civil Service Law which provides for a prior hearing.

[9] See also: *Goldberg* v. *Kelly, supra,* where this Court held that a prior hearing was necessary even though a subsequent *hearing* was afforded; *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed. 2d 349 (1969) where this Court held that a prior hearing was necessary even though a subsequent *trial* was accorded; *Boddie* v. *Connecticut*, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed. 2d 113 (1971); *Wisconsin* v. *Constantineau, supra.*

The foregoing discussion substantiates the holding of the Court below that, under pre-*Arnett* decisions of this Court, the Appellee was entitled to a due process hearing prior to the action taken against her by the government relative to her employment status, inasmuch as she possessed interests in property and liberty of constitutional dimensions; and that the procedures provided for in Section 72 of the New York Civil Service Law do not provide "the kinds of notice and hearing that are likely to establish the validity of the deprivation in question" so as "to assure that a finding of mental unfitness will be a fair and accurate one." See: Decision of the Court below at 355 F. Supp. 764, 772 (S.D.N.Y. 1973).

Moreover, after further consideration of the issues herein upon remand by this Court in light of its decision in *Arnett* v. *Kennedy, supra,* the District Court was totally justified in concluding that *Arnett* did not require it to change its initial conclusion that the Appellee possessed constitutionally protected interests; and that the procedures challenged herein do not comport with rudimentary due process.

B. The Decision of the Three District Judge Court Below Is Supported by and Consistent With This Court's Pronouncement in *Arnett* v. *Kennedy*, 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed. 2d 15 (1974) Relative to the Necessity for and Nature of Procedural Due Process.

In *Arnett, supra* the basic question was whether a tenured employee's termination, pursuant to the Lloyd-La Follette Act (5 U.S.C. §7501) and its attendant regulations, complied with constitutional due process requirements under the Fifth Amendment, as those requirements have been enunciated by recent decisions of this Court. That basic issue was subdivided by this Court in the following way:

a. Is such an employee protected by the Due Process Clause of the United States Constitution and this Court's decisions interpreting the same, when the federal statute, though specifically granting the employee a property right in his job, specifically defines and limits the due process protection to be accorded to such an employee?

b. In balancing the interests of the government against the interests of the individual employee, do the safeguards embodied in the act and its attendant regulations satisfy minimal due process requirements?

Among the six justices of this Court who held the statutory procedures in the Lloyd-LaFollette Act must be measured by constitutional due process standards and cannot be self-defining,[10] four (Mr. Justice White, Mr. Justice

[10] See: *Watson* v. *Branch County Bank*, 380 F.Supp. 945, 964 (W.D. Mich. 1974) where Chief Judge Fox, in interpreting *Arnett, supra,* stated:

"In more recent cases, the Supreme Court has been closely exploring the limits of the due process guarantee. A majority of the Court has rejected the view that a statutorily created property right can be conditioned on a statutory limitation of procedural due process protections. Rather, once the right exists, the procedures established for its impairment or deprivation must meet constitutional standards. *Arnett* v. *Kennedy*, 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed. 2d 15 (April 16, 1974)."

See also: *Janis* v. *Wilson*, 521 F.2d 724, 729 at footnote 9 (8th Cir. 1975).

Brennan, Mr. Justice Douglas and Mr. Justice Marshall) found the statutory due process provisions constitutionally defective; while only two (Mr. Justice Blackmun and Mr. Justice Powell) found the statutory due process provisions constitutionally acceptable. However, when the latter two were joined with Mr. Chief Justice Berger, Mr. Justice Rehnquist and Mr. Justice Stewart, who accepted the statutory limitations attached to the constitutionally recognized property and liberty interests, it provided a majority for the result arrived at in *Arnett, supra.* In applying *Arnett, supra,* to the instant case, it is necessary to analyze the reasoning of each justice of this Court in order to understand how the District Court herein arrived at its decision, on remand.

Since the majority of the Court answered question (a) above in the affirmative (6-3), with the three justices who responded negatively to question (a) never addressing themselves to question (b) above, the issue in this case must be formulated in light of the six justices who addressed themselves to the second question in *Arnett, supra,* to wit: in balancing the interest of the public employer in discharging unsatisfactory employees with the interest of the employee in continued employement, do the safeguards encompassed within the legislation satisfy minimal due process requirements? Appellee submits that, in view of *Arnett,* the answer lies in comparing the due process protections embodied within 5 U.S.C. §7501 (the Lloyd LaFollette Act) and its attendant regulations—with the due process protections of Section 72 of the Civil Service Law of the State of New York, which the Court below correctly held was facially unconstitutional.

The federal statute, and its attendant regulations, provide the following protection to the employee prior to effecting any adverse action:

1. Notice of the charges preferred against the employee.
2. A copy of the charges.
3. A reasonable time for filing a written answer to the charges.
4. A written decision on the answer at an early, practicable date.
5. Thirty-days advance written notice prior to removal.
6. An opportunity for the employee to appear before the official who is charged with the authority to remove him or her.
7. Notice of the adverse decision, prior to its effective date.
8. Notice of a right to appeal from an adverse decision.
9. A full evidentiary, trial-type hearing at the appeal stage of the proceeding.

In contrast to the above protections initially afforded to an affected employee under the federal statute in ***Arnett, supra,*** the only procedural safeguards initially afforded to the Appellee herein, under Section 72 of the Civil Service Law of the State of New York, was a written statement of the reason for her suspension. Section 72 *does not incorporate any of the safeguards enumerated above under the Lloyd-La Follette Act;* and for that matter has virtually no safeguards whatsoever.

Most importantly, Section 72 does not require a trial-type evidentiary hearing at the appeal stage of the proceeding, as did the Lloyd-La Follette Act in ***Arnett, supra.***

Moreover, under Section 72, at the second stage of appeal the Appellee is required to assume the burden of proof to show that the ex parte determination of the medical officer was arbitrary or unreasonable. If she is unable to meet this burden of proof within one year after her suspension, she is automatically terminated.

Of significance in ***Arnett*** is that two of the Justices, who joined in the result but who did so only after examining the statute along constitutional standards, found that the existence of the main thrust of the statutory procedures, after the fact rather than before the fact of discharge, was constitutionally acceptable only because in ***Arnett*** the employee failed to show an infringement upon a constitutionally protected "liberty interest."

In the instant case, the Court below held that the charge of mental incompetence, which attached to the Appellee, possessed:

> ". . . a substantially greater threat to her liberty and property—as measured by potential lasting harm to reputation and employability caused by an initial adverse determination [footnote omitted]—than was the plaintiff in ***Arnett.***" [11]

See: 389 F.Supp. 935, 937 (S.D.N.Y. 1974).

The District Court went on to say that:

> "Since an initial adverse determination is likely to produce more substantial harm to reputation and employability in this case than in ***Arnett,*** and since that harm is less easily eliminated by a subsequent vindication in this case than in ***Arnett,*** due process requires the ob-

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[11] The footnote omitted alluded to ***Roth, supra*** at pages 572-574. For a discussion in this regard, herein, see argument "A" ***supra.***

servance here of more adequate safeguards against an incorrect initial determination. We therefore reaffirm our conclusion that absent exceptional circumstances a prior adversarial hearing must be held, the precise form of which, as we previously noted, we do not prescribe but leave to the State to meet the test of 'rudimentary due process.'" *Ibid.*

Appellee submits that the combination of the absence of rudimentary procedures in Section 72 of the Civil Service Law of the State of New York, as compared to the relatively comprehensive safeguards in the federal statute in *Arnett, supra,* and the fact that the action of the Appellants herein affected both the Appellee's constitutionally protected "property interest" and her constitutionally protected "liberty interest", as contrasted to the fact that, in *Arnett,* the action therein affected only the employee's constitutionally protected "property interest", left the District Court no other option but to conclude that, based on a comprehensive analysis of each of the Justices' positions in *Arnett, supra,* all of the Justices of this Court would find Section 72 of the Civil Service Law of the State of New York constitutionally defective; and, accordingly left the District Court no other alternative but to reaffirm its previous decision in this matter in view of its consistency with both *Arnett, supra,* and the pre-*Arnett* decisions of this Court.

CONCLUSION

This Court should decline to invoke the doctrine of mootness. Furthermore, in view of *Arnett* v. *Kennedy, supra,* and the pre-*Arnett* decisions of this Court as heretofore discussed, this Court should summarily affirm the decision of the District Court below since the questions

presented are so wanting in substance as not to need further argument.

Date: New York, New York
February 28, 1975

Respectfully submitted,

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Certificate of Service

Nathaniel R. Jones, one of the attorneys for the Appellee, certifies that on the 26th day of February, 1976, I did serve three copies of the foregoing Motion to Affirm and the Brief in Support thereof, upon the attorneys for the Appellants by mailing the same, first-class, postage prepaid to them as follows: Office of the Attorney General, State of New York, Two World Trade Center, New York, New York 10047 Attention: Ms. Lillian Cohen, Assistant Attorney General.

Dated: New York, New York
February 28, 1975

Respectfully submitted,

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APPENDICES

Appendix "A"

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

FILED

Dec 10 1975

S.D. of N. Y.

72 Civil 4536

OPINION

43513

MARIE SNEAD,

Plaintiff,

—against—

DEPARTMENT OF SOCIAL SERVICES OF THE CITY OF NEW YORK, a governmental agency, JULES SUGARMAN, in his official capacity as Commissioner of the Department of Social Services of the City of New York, INES MONTEVERDE, in her official capacity as a Supervisor in the Department of Social Services of the City of New York, CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK, a governmental agency, HARRY L. BRONSTEIN, in his official capacity as Chairman of the Civil Service Commission of the City of New York, CIVIL SERVICE COMMISSION OF THE STATE OF NEW YORK, a governmental agency, ERTHA POSTON, in her official capacity as Chairman of the Civil Service Commission of the State of New York,

Defendants.

Appendix "A"

Before:

MULLIGAN, *Circuit Judge,* and
WEINFELD and BRYAN, *District Judges.*

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EDWARD WEINFELD, *D. J.*

This belated motion by the City of New York defendants to dismiss the complaint on the ground that the court lacks jurisdiction to grant plaintiff's claim for damages requires a brief history of this litigation, now approaching its fourth year, in which time the case has been before the Supreme Court twice without a final determination on the merits.

Appendix "A"

Plaintiff, a Civil Service social worker in the employ of New York City's Department of Social Services, was placed on involuntary leave without a hearing. She commenced this action on October 25, 1972, upon a claim that section 72 of the New York Civil Service Law, which governs leaves of absence for mentally unfit Civil Service employees, was unconstitutional. She moved for (1) the convening of a three-judge court, and, pending the final determination of the merits by the panel, (2) a preliminary injunction and a temporary restraining order directing defendants to reinstate plaintiff with back pay. Jurisdiction was predicated upon 28 U.S.C., sections 1331, 1343(3) and 1343(4) and 42 U.S.C., section 1983.

The defendants cross-moved to dismiss the complaint pursuant to Rules 12(b)(1) and (b)(6) of the Federal Rules of Civil Procedure on the grounds that the court lacked subject matter jurisdiction and the complaint failed to state a claim upon which relief may be granted. The motion to convene a three-judge court was granted, but the motion for temporary injunctive relief directing her reinstatement with back pay was denied.[1]

Thereafter, the defendants argued before the three-judge court for dismissal of the action upon the grounds (1) that the statute comported with due process requirements, (2) that plaintiff failed to exhaust administrative remedies, and (3) that this court should abstain from a determination on the merits in order to afford the state courts an opportunity to construe section 72 to meet plaintiff's constitutional challenge. The three-judge court rejected the defendants' contentions, declared section 72 of the New York Civil Service Law unconstitutional, en-

[1] Snead v. Department of Social Services, 351 F. Supp. 1360 (S.D.N.Y. 1972).

joined defendants from taking any action thereunder, and ordered that plaintiff be reinstated with back pay for the period of her involuntary leave of absence.[2]

Upon appeal, the Supreme Court vacated the judgment and remanded the case for further consideration of the due process issue in the light of its decision in *Arnett* v. *Kennedy*.[3] After hearing further argument following the remand, this court, holding that there were critical differences between *Arnett* and this case, adhered to its prior ruling that the New York statute did not comply with due process requirements.[4] Upon defendants' appeal from this determination, the Supreme Court again vacated the judgment, this time remanding the case to the three-judge court for consideration of the question of mootness.[5] While the Supreme Court did not identify the mootness issue, evidently its remand was based upon the fact that plaintiff had been reinstated to her former position. The three-judge court, upon this second remand, heard argument and determined on July 22, 1975 that the action was not moot since plaintiff's original prayer for relief, in addition to seeking a declaration that section 72 was unconstitutional also sought reinstatement to her former position with back pay.[6] Although plaintiff had been reinstated, the "City stubbornly refuse[d] to give her back pay," which had been directed by the three-judge court in its original disposition

[2] Snead v. Department of Social Services, 355 F. Supp. 764 (S.D.N.Y. 1973).

[3] 416 U.S. 977 (1974).

[4] Snead v. Department of Social Services, 389 F. Supp. 935 (S.D.N.Y. 1974).

[5] 421 U.S. 982 (1975).

[6] Snead v. Department of Social Services, Civil No. 72-4536 (S.D.N.Y., July 22, 1975).

in March 1973. Accordingly, the three-judge court held that plaintiff was entitled to judgment awarding her back pay.

Up to this point in the litigation, the defendants in the various challenges to plaintiff's claims for relief never made any contention as to lack of jurisdiction or failure to state a claim with respect to the demand for back pay. Following the three-judge court's latest ruling that the action was not moot, the plaintiff in August 1975 proposed a judgment which, among other matters, declared the state statute unconstitutional, directed plaintiff's reinstatement (which already was in effect), adjudged plaintiff entitled to recover $12,630 in back pay from the municipal defendants, and awarded her sick leave and vacation benefits of which she had been deprived during her involuntary leave of absence. After a delay occasioned by dilatory tactics of the Corporation Counsel assistants, during which they failed to object or consent to the form of the proposed judgment, plaintiff's counsel was forced to move for the entry of a formal judgment to effectuate this court's ruling. Then, for the first time during the entire course of this litigation, the municipal defendants raised the issue of lack of jurisdiction with respect to the plaintiff's claim for back pay. In opposing plaintiff's motion for entry of judgment, they renewed an earlier motion to dismiss the complaint denied almost three years ago, now moving to dismiss pursuant to Rules 12(b)(6) and 12(h)(3) on the new "grounds that the Court lacks jurisdiction to grant plaintiff's claim for damages." Essentially they urge, in reliance upon *City of Kenosha* v. *Bruno*[7] and *Monroe* v. *Pape*,[8] that

[7] 412 U.S. 507 (1973).

[8] 365 U.S. 167 (1961).

municipalities may not be held liable for equitable relief or damages in an action for violation of civil rights under 42 U.S.C., section 1983, and hence the court was without jurisdiction over such a claim under 28 U.S.C., section 1343. But accepting the principle of non-liability of the municipal defendants under those provisions does not resolve the question now presented in this case, which from its inception has generated its own facts.

Preliminarily, it is observed that this is not a civil rights class action. While plaintiff asserted a claim under the Civil Rights Act, 42 U.S.C., section 1983, and with respect thereto alleged jurisdiction under 28 U.S.C., sections 1343(3) and (4), she did not confine her claim or jurisdiction to those provisions. Plaintiff, aggrieved by her suspension as a Civil Service employee, charged that the state statute was void for denial of her right to due process under the Fourteenth Amendment. Specifically, she alleged that the action was one "seeking redress for the deprivation of [her] constitutional and civil rights, the matter in controversy exceeding the value of $10,000, exclusive of interest and costs." Thus, in this aspect of her case, she squarely grounded jurisdiction on section 1331(a), which provides:

> "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

Since plaintiff alleged a deprivation of her constitutional rights and her damage claim was in excess of $10,000, there can be no doubt that the court had "federal question" jurisdiction of her claim under that section.

Defendants' position is that plaintiff having been awarded a judgment declaring section 72 unconstitutional and having been reinstated to her job, the court had thereby exhausted its jurisdiction and had no subject matter jurisdiction over the back wage aspect of her claim, since it was not one "arising under" the Constitution or laws of the United States. This effort to truncate the court's jurisdiction with respect to the back pay claim after judgment in plaintiff's favor must fail.

The municipal defendants' challenge to an award of damages is that Congress did not expressly grant the district court power to hear such a cause of action premised directly upon the Fourteenth Amendment. The argument proceeds further that Congress affirmatively created such a cause of action to enforce the Fourteenth Amendment when it passed the Civil Rights Act of 1871 (now 42 U.S.C., section 1983), and since it created no other right of action predicated directly on the Fourteenth Amendment there is no jurisdiction under section 1331—in sum, absent an express congressional authorization to award damages for a violation of Fourteenth Amendment rights, the courts lack jurisdiction to make such an award.

This argument blurs the distinction between subject matter jurisdiction and failure to state a claim. It runs directly afoul of the principles announced in *Bell* v. *Hood*.[9] There plaintiffs sought damages for alleged violations of their rights under the Fourth and Fifth Amendments and asserted jurisdiction under 28 U.S.C., section 41(1), the predecessor of section 1331. The district court dismissed the action, and the Court of Appeals affirmed[10] on the

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[9] 327 U.S. 678 (1946).

[10] 150 F.2d 96 (9th Cir. 1945).

ground it was not one that arose "under the Constitution or laws of the United States . . . ," as required by 28 U.S.C., section 41(1), and the court therefore lacked subject matter jurisdiction. The Supreme Court reversed, holding:

> "[W]here the complaint, as here, is so drawn as to seek recovery directly under the Constitution or laws of the United States, the federal court . . . must entertain the suit.
>
> . . . .
>
> "Jurisdiction . . . is not defeated as respondents seem to contend, by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction.
>
> . . . .
>
> "[T]he right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another." [11]

[11] 327 U.S. at 681-82, 685.

This holding was reaffirmed in *Wheeldin* v. *Wheeler*,[12] and recently adopted by the Second Circuit in a case cited by the parties which considered but did not pass upon the very question raised here—whether there is an implied right to damages under the Fourteenth Amendment.[13]

The defendants' reliance upon *City of Kenosha* v. *Bruno*,[14] the Supreme Court's latest ruling which recognized that a municipality is immune from a claim under the Civil Rights Act and consequently that the Court lacks jurisdiction under section 1343, is misplaced. It is significant that the majority remanded the case to the district court to consider the availability of section 1331 jurisdiction, which had been alleged but not passed upon by the court below. Additionally, Mr. Justice Brennan, in his concurrence, joined in by Mr. Justice Marshall, stated:

[12] 373 U.S. 647, 649 (1963).

[13] *See* Brault v. Town of Milton, Dkt. No. 74-2370 (2d Cir., Oct. 1, 1975) (en banc), slip. op. at 6278 n.1:

> "Federal jurisdiction is invoked under 28 U.S.C. § 1331, the complaint alleging that the amount in controversy exceeds $10,000. Since plaintiffs have drawn their complaint so as to seek recovery under the Constitution and laws of the United States, this court has jurisdiction to hear the case, even if the complaint ultimately fails to state a claim. *Bell* v. *Hood*, 327 U.S. 678, 682 (1946)."

The majority of the en banc panel in *Brault* held that the plaintiffs did not establish that their Fourteenth Amendment rights had been violated, and therefore did not have to decide whether such a violation would give rise to a damage claim. It is interesting to note that in Fisher v. City of New York, 312 F.2d 890 (2d Cir. 1963), the Second Circuit had held that there was no implied right to damages under the Fourteenth Amendment. The basis for the dismissal of the action, however, was not lack of subject matter jurisdiction, but failure to state a claim upon which relief could be granted. *See also* Dexter v. Equitable Life Assur. Soc'y, Dkt. No. 75-7427 (2d Cir., Nov. 18, 1975).

[14] 412 U.S. 507 (1973).

"If appellees can prove their allegation that at least $10,000 is in controversy, then section 1331 jurisdiction is available, *Bell* v. *Hood,* 327 U.S. 678 (1946); cf. *Bivens* v. *Six Fed. Narcotics Agents,* 403 U.S. 388 (1971) . . . ." [15]

Plaintiff's claim was in excess of $10,000 and recovery was sought for a violation of her constitutional rights. The court had jurisdiction to hear and determine the suit under section 1331(a).[16]

Although the defendants now expressly disavow any attack "based upon plaintiff's failure to allege facts sufficient to state a cause of action," [17] in view of the history of this case this branch of the motion also should be resolved and put to rest. First, to the extent that this attack is a renewal of the City's earlier motion to dismiss, it may properly be denied for failure to comply with Local General Rule 9(m).[18] But there are additional and weightier reasons for its denial.

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[15] *Id.* 516.

[16] It is not without interest to note that in Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971), which upheld a claim for damages based upon a violation of Fourth Amendment rights, jurisdiction was asserted under the very sections relied on by the plaintiff here. The Court upheld jurisdiction under section 1331(a), but noted that neither 28 U.S.C. § 1343(3) nor 28 U.S.C. §1343(4), combined with 42 U.S.C. § 193, would support jurisdiction over the damage claim. *See also* Greenya v. George Washington Univ., 512 F.2d 556, 562, n.13 (D.C. Cir. 1975).

[17] Municipal Defendants' Supplementary Memorandum at 5. We note, however, that the defendants' notice of motion does refer to Rule 12(b)(6), which governs motions for "failure to state a claim upon which relief can be granted."

[18] Rule 9(m) requires that a notice of motion for reargument be served within 10 days of the filing of the court's determination of the original motion. The City's "renewal" motion here followed a gap of almost three years.

Plaintiff's claim for back wages has been in the case from its very inception, and the three-judge court in its original disposition on March 12, 1973 "ordered that plaintiff be reinstated with back pay for the period of her involuntary leave of absence." On March 27, 1973, the municipal defendants and plaintiff stipulated "that the back pay award be stayed pending the final deposition [sic] of the appeal of the adjudicated decision." The recognition that a claim for back pay had been made and allowed, and the failure of defendants to raise their current contention until long after the adjudication upon the merits in plaintiff's favor, forecloses defendants' attack for failure to state a claim. If, as stated in *Bell* v. *Hood,* "the failure to state a proper cause of action calls for a judgment on the merits," then a litigant should not be permitted to raise such a failure after a determination on the merits. This view finds support in Rule 12(h)(2) of the Federal Rules of Civil Procedure, which provides that "[a] defense of failure to state a claim upon which relief can be granted . . . may be made in any pleading . . . or by motion for judgment on the pleadings or at trial on the merits." The clear thrust of the Rule is that a failure to state a claim may be raised at any time *before* a disposition on the merits but not *after.* Any other construction would not only add to intolerable delay, but create uncertainty as to the validity of a final judgment on the merits.

Finally, at this post-judgment stage of this long-drawn litigation, to hold, assuming defendants are correct, that plaintiff has failed to state a claim for back wages would reward defendants for dilatoriness and penalize plaintiff. Upon argument the City defendants conceded that were this action dismissed and plaintiff now required to com-

mence anew an action in the state court for recovery of her unpaid back wages, the claim would be barred by the statute of limitations.

Accordingly, we hold that defendants have waived their objection that the complaint fails to state a cause of action for damages.[19] The plaintiff's motion for entry of judgment is granted.

Dated: New York, N. Y.
December 10, 1975

EDWARD WEINFELD
U.S.D.J.

FREDERICK P. BRYAN
U.S.D.J.

[19] *See* C. Albert Sauter Co. v. Richard S. Sauter Co., 368 F. Supp. 501, 511 (E.D. Pa. 1973). *Cf.* Smeed v. Carpenter, 274 F.2d 414, 418 (9th Cir. 1960); Munson Line v. Green, 6 F.R.D. 470, 475 (S.D.N.Y. 1947). By so holding we intimate no view as to how the damage issue would have been decided had it been timely raised. In that event, we would have expressly faced the question whether plaintiff would have been entitled to damages directly under the Fourteenth Amendment, which was the issue left unresolved in *Brault* v. *Town of Milton*. *See* n.13 *supra*. We decide only that it is not jurisdictional in nature, and therefore that the issue presented by our earlier award of damages is subject to waiver.

MULLIGAN, *C.J.* (concurring in the result):

I cannot agree with the majority that this court has jurisdiction under section 1331 to award damages for a violation of Fourteenth Amendment rights. Since municipalities are expressly excluded from section 1983 liability,[1] Congress could hardly have intended them to be included in a Fourteenth Amendment action predicated on section 1331, the general federal jurisdiction section. The legislative background of section 1331, which is discussed in *Lynch* v. *Household Finance Corp.*,[2] is hardly indicative of a congressional intention to create a jurisdictional base for actions against municipalities founded directly on the Constitution.

Unlike the Fourth Amendment, the Fourteenth contains an explicit provision (section 5) giving Congress the power to enact appropriate legislation. The predecessor of section 1983 (and its jurisdictional predicate, section 1343) was section 1 of the Civil Rights Act of 1871, which Congress expressly stated was enacted to enforce the provisions of the Fourteenth Amendment.[3] Thus section 1983 is the product of congressional action pursuant to section 5 of the Fourteenth Amendment. But in enacting section 1983, Congress rejected relief against municipalities.[4] Hence *Bivens* v. *Six Unknown Named Agents*,[5] a Fourth Amendment case, is distinguishable. In *Bivens* there also were "no special factors counselling hesitation in the absence of

[1] City of Kenosha v. Bruno, 412 U.S. 507 (1973); Monroe v. Pape, 365 U.S. 167 (1961).

[2] 405 U.S. 538, 546-48 (1972).

[3] District of Columbia v. Carter, 409 U.S. 418, 423 (1973).

[4] Monroe v. Pape, *supra*.

[5] 403 U.S. 388 (1971).

affirmative action by Congress," [6] and there was "no explicit congressional declaration that persons injured by a federal officer's violation of the Fourth Amendment may not recover money damages from the agents." [7] In this case there is a special factor counselling hesitation, namely, the fiscal vulnerability of a sorely pressed municipality, and the explicit language of section 1983 limiting liability to "persons," which has been construed not to encompass municipalities.

I would hold instead that we have pendent jurisdiction here. The plaintiff does have a state cause of action to recover back wages following an improper dismissal.[8] The state and federal claims here arise out of a "common nucleus of operative fact" and it certainly is in the interest of judicial economy to dispose of the claims together.[9] The defendants argue that the claim has been raised too late by the plaintiffs, but they themselves did not raise the jurisdictional issue until this stage of the litigation.[10] As the majority opinion notes, the equities are entirely with the plaintiff; since the question of pendent jurisdiction is one within our discretion to entertain,[11] we should take account of the hardship and delay already suffered by the plaintiff here. The argument that pendent jurisdiction is foreclosed by res judicata because the plaintiff's state claims have already been litigated and dismissed

[6] *Id.* at 396.

[7] *Id.* at 397.

[8] New York Civil Service Law § 77.

[9] United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966).

[10] *See* 28 U.S.C. § 1653 (defective allegations of jurisdiction may be amended in the trial or appellate courts).

[11] United Mine Workers v. Gibbs, *supra*, 383 U.S. at 726.

in New York is specious, since it is clear that the New York dismissal [12] was for failure to exhaust administrative remedies. That would not bar a subsequent state action on the merits. Since we have already determined that section 72 of the New York Civil Service Act is unconstitutional, the claim for back wages should properly be determined here.

Dated: New York, N.Y.
December 10, 1975

WILLIAM H. MULLIGAN (per MDD)
U.S.C.J.

[12] 168 N.Y.L.J., Aug. 11, 1972, at 2.

Appendix "B"

IN THE

UNITED STATES DISTRICT COURT

FOR THE

SOUTHERN DISTRICT OF NEW YORK

CIVIL No. 72 Civ. 4536

MARIE SNEAD,

Plaintiff,

vs.

DEPARTMENT OF SOCIAL SERVICES OF THE CITY OF NEW YORK, *etc., et al.,*

Defendants.

JUDGMENT

The above-entitled and numbered cause coming on to be heard on the 19th day of June, 1975, pursuant to the Supreme Court of the United States having vacated the judgment and remanded the case to this Court for consideration of the question of mootness, and all parties hereto having appeared by counsel and the Court having heard the arguments of counsel and the memorandum of law submitted by the State Defendants and Plaintiff's memorandum in response thereto, and upon due consideration thereof, it appearing to the Court that Plaintiff should be granted the relief prayed for in her Complaint, it is therefore on this 10th day of December, 1975

Appendix "B"

ORDERED, ADJUDGED AND DECREED that Section 72 of the New York Civil Service Law is hereby declared unconstitutional and it is further

ORDERED, ADJUDGED AND DECREED that the Defendants are hereby enjoined from taking any action pursuant to Section 72 of the New York Civil Service Law and it is further

ORDERED, ADJUDGED AND DECREED that the Defendants are to expunge all references and documentation in Plaintiff's personnel file relative to Plaintiff having been declared mentally unfit pursuant to said Section 72 of the New York Civil Service Law and it is further

ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover from the Defendant Department of Social Services of the City of New York and the Defendant Civil Service Commission of the City of New York the sum of $12,630.00, representing back pay with increments and legal interest thereon for the period of Plaintiff's involuntary leave of absence together with further interest thereon from the 10th day of December 1975 until paid and it is further

ORDERED, ADJUDGED AND DECREED that Plaintiff be awarded eleven (11) sick days and twenty (20) vacation days, representing benefits lost during the period of her involuntary leave of absence and it is further

Appendix "B"

ORDERED, ADJUDGED AND DECREED that the Defendants pay all costs of these proceedings to be taxed by the Clerk of this Court.

Dated: December 10, 1975.

/s/ WILLIAM H. MULLIGAN
William H. Mulligan
United States District Judge

/s/ EDWARD WEINFELD
Edward Weinfeld
United States District Judge

/s/ FREDERICK VAN PELT BRYAN
Frederick Van Pelt Bryan
United States District Judge

JUDGMENT ENTERED—12-17-75
RAYMOND F. BURGHARDT
Clerk

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk

By /s/ B. WASSERMAN
Deputy Clerk

Appendix "C"

§ 75. *Removal and other disciplinary action*

1. Removal or disciplinary action. A person described in paragraph (a) or paragraph (b) of this subdivision shall not be removed or otherwise subjected to any disciplinary penalty provided in this section except for incompetency or misconduct shown after a hearing upon stated charges pursuant to this section.

(a) A person holding a position by permanent appointment in the competitive class of the classified civil service, or

(b) a person holding a position by permanent appointment or employment in the classified service of the state or in the several cities, counties, towns, or villages thereof, or in any other political or civil division of the state or of a municipality, or in the public school service, or in any public or special district, or in the service of any authority, commission or board, or in any other branch of public service, who is an honorable discharged member of the armed forces of the United States having served therein as such member in time of war as defined in section eighty-five of this chapter, or who is an exempt volunteer fireman as defined in the general municipal law, except when a person described in this paragraph holds the position of private secretary, cashier or deputy of any official or department.

2. Procedure. A person against whom removal or other disciplinary action is proposed shall have written notice thereof and of the reasons therefor, shall be furnished a copy of the charges preferred against him and shall be allowed at least eight days for answering the same in writ-

ing. The hearing upon such charges shall be held by the officer or body having the power to remove the person against whom such charges are preferred, or by a deputy or other employee of such officer or body designated in writing for that purpose. In case a deputy or other employee is so designated, he shall, for the purpose of such hearing, be vested with all the powers of such officer or body and shall make a record of such hearing which shall, with his recommendations, be referred to such officer or body for review and decision. The person or persons holding such hearing shall, upon the request of the person against whom charges are preferred, permit him to be represented by counsel, and shall allow him to summon witnesses in his behalf. The burden of proving incompetency or misconduct shall be upon the person alleging the same. Compliance with technical rules of evidence shall not be required.

3. Suspension pending determination of charges; penalties. Pending the hearing and determination of charges of incompetency or misconduct, the officer or employee against whom such charges have been preferred may be suspended without pay for a period not exceeding thirty days. If such officer or employee is found guilty of the charges, the penalty or punishment may consist of a reprimand, a fine not to exceed one hundred dollars to be deducted from the salary or wages of such officer or employee, suspension without pay for a period not exceeding two months, demotion in grade and title, or dismissal from the service; provided, however, that the time during which an officer or employee is suspended without pay may be considered as part of the penalty. If he is acquitted, he shall be restored to his position with full pay for the period of sus-

pension less the amount of compensation which he may have earned in any other employment or occupation and any unemployment insurance benefits he may have received during such period. If such officer or employee is found guilty, a copy of the charges, his written answer thereto, a transcript of the hearing, and the determination shall be filed in the office of the department or agency in which he has been employed, and a copy thereof shall be filed with the civil service commission having jurisdiction over such position. A copy of the transcript of the hearing shall, upon request of the officer or employee affected, be furnished to him without charge.

4. Notwithstanding any other provisions of law, no removal or disciplinary proceeding shall be commenced more than five years after the occurrence of the alleged incompetency or misconduct complained of and described in the charges; provided, however, that such limitation shall not apply where the incompetency or misconduct complained of and described in the charges would, if proved in a court or appropriate jurisdiction, constitute a crime, L. 1958, c. 790, eff. April 1, 1959.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

Supreme Court, U. S.
FILED
APR 21 1976
MICHAEL RODAK, JR., CLERK

75-805

CIVIL SERVICE COMMISSION OF THE STATE OF NEW YORK, a governmental agency, ERSA POSTON, in her official capacity as Chairman of the Civil Service Commission of the State of New York,

Appellants,

against

MARIE SNEAD,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF

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IN THE

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OCTOBER TERM, 1975

75-805

CIVIL SERVICE COMMISSION OF THE STATE OF NEW YORK, a governmental agency, ERSA POSTON, in her official capacity as Chairman of the Civil Service Commission of the State of New York,

Appellants,

against

MARIE SNEAD,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF

On February 24, 1976 this Court decided *Mathews* v. *Eldridge*, —— U.S. ——, 47 L. Ed. 2d 18, holding that due process does not require that an evidentiary hearing be held prior to termination of social security disability payments to persons who are physically or mentally disabled. This decision reaffirms appellants' view that due process does not require such a hearing in the instant case, particularly since in *Eldridge* this Court placed relevant limitations on *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), the case which the Court below considered dispositive of the hearing issue.

In *Eldridge,* as in this case, the District Court held that a prior adversary hearing was necessary "because disability determinations may involve subjective judgments based on conflicting medical and nonmedical evidence." 47 L.Ed. 2d 28. This Court specifically rejected the reasoning of the District Court, citing *Richardson* v. *Perales,* 402 U.S. 389, 404 (1971) which

> "recognized the 'reliability and probative worth of written medical reports' [and] emphasiz[ed] that while there may be 'professional disagreement with the medical conclusions' the 'specter of questionable credibility and veracity is not present.'" 47 L. Ed. at 39.

In view of the "'routine, standard, and unbiased medical reports by physician specialists' . . . concerning a subject whom they have personally examined" this Court concluded that there is less risk of error than in the circumstances presented by *Goldberg* v. *Kelly* and, therefore, less need for the adversary hearing required by that case. 47 L. Ed. 2d at 38.

This conclusion is equally applicable in the instant case where the State predicates its action upon an "informed evaluation by a neutral" medical expert. Contrast *Fuentes* v. *Shevin,* 407 U.S. 67, 83 (1972). Indeed, as a practical matter the examining physician is often in private practice and therefore has no interest in whether the employee does or does not remain on the job.

In *Eldridge,* the Court also distinguished *Goldberg* v. *Kelly* in terms of the impact of the government's action on the private interest involved. The Court concluded that insofar as that interest is the "source of income pending final administrative decision," the recipient of disability benefits is different from the welfare recipient because he has other potential sources of income. 47 L. Ed. 2d at 36.

Therefore, "the disabled worker's need is likely to be less than that of a welfare recipient" even though the delay in obtaining administrative review may exceed one year. 47 L. Ed. 2d at 37. Because of these other income sources, the Court determined that

> "there is less reason here than in *Goldberg* to depart from the ordinary principle, established by our decisions, that something less than an evidentiary hearing is sufficient prior to adverse administrative action."• 47 L. Ed. 2d at 38.

The employee who is placed on leave pursuant to § 72 is likely to feel even less economic impact than the disabled worker in *Eldridge.* Thus, at the time he is placed on leave he is "entitled to draw all accumulated, unused sick leave, vacation, overtime and other time allowances standing to his credit." § 72 (1). Therefore, depending upon his length of service, he may not have to seek income from other sources while pursuing his administrative remedies. Furthermore, unlike *Eldridge,* there has never been any showing that the process of administrative appeal and review under § 72 is a lengthy one. Appellee can hardly point to her own experience since she never availed herself of her right to appeal to the Civil Service Commission. Finally, the statute provides that the employee who successfully appeals must be reinstated to his position. This relief carries with it entitlement to the amount of back wages involved.

Eldridge is also relevant because it reiterates the importance of weighing the government's interest in determining what due process requires in the context of a case where the only interest advanced was that of "conserving

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• Significantly for purposes of the instant case, *Eldridge* reaches this conclusion notwithstanding the fact that the existence of a disability presupposes an inability to earn a living.

scarce fiscal and administrative resources." 47 L. Ed. 2d at 41. The government interest in the instant case is far more critical since it involves the proper and efficient functioning of the State's agencies. This critical interest was not weighed by the Court below.

Appellee contends that the employee who has been placed on a Section 72 leave of absence is subject to automatic termination at the end of one year. This argument ignores the plain language of the relevant statute, Section 73 of the New York Civil Service Law, which provides only that the employment status "may" be terminated where the "employee has been continuously absent from and unable to perform the duties of his position for one year or more." Furthermore, even if the employee is ultimately discharged, he may still be reinstated to his position if, within one year *after the termination of disability,* he satisfies a medical examination.

Clearly the Legislature intended to solve a difficult personnel problem and, at the same time, preserve the right of the employee to come back to work. The imposition of other procedural formalities than those already provided would subvert the obvious purpose of the Legislature to remove this type of medical evaluation, which rests on an assumption that the employee is not at fault, from the type of adversarial process afforded by Section 75 of the Civil Service Law which contemplates termination (Appellee's Br., Appendix).

CONCLUSION

For the foregoing reasons, the decision below should be summarily reversed.

Dated: New York, New York, April 20, 1976.

Respectfully submitted,

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